Having heard the arguments of counsel for both sides to the application and having considered all the materials including the affidavit evidence and the materials before me and all the circumstances of the case, I come to the conclusion that the balance of convenience lies in favour of refusing the interlocutory relief as sought. In the exercise of the discretion of the court, I refuse the application. The application is dismissed with costs to the second defendant. In the absence of an agreement between the parties, such costs are to be taxed.

Another matter needs be mentioned. In arriving at the above conclusion, I placed no reliance on the supplementary affidavit evidence of Miss Mary Roberts, counsel for the second defendant, since I tend to agree with the submission of counsel for the plaintiffs that no source or ground of the matters therein deposed has been disclosed.

Order accordingly.

Solicitors: *Nicholas Fung, Tokuzip & Co.; Sugumar & Co.*

LEE BROTHERS CONSTRUCTION CO. v. TEH TENG SENG REALTY SDN. BHD.

[O.C.J. (Peh Swee Chin J.) September 10, 1987]

[Ipoh – Civil Suit Nos. 23-106-87 and 23-107-87]

Civil Procedure – Stay of proceedings pending arbitration – Application for – Principles applicable – Whether application could be heard together with Order 14 application – Merits of application.

Arbitration – Stay of proceedings pending arbitration – Application for – Principles applicable.

In both civil suits, *i.e.* Civil Suit No. 23-106-87 and Civil Suit No. 23-107-87, the plaintiffs were building contractors and the defendant was a housing developer.

In Civil Suit No. 23-107-87, the plaintiffs claim damages for breach of contract while in Civil Suit No. 23-106-87, the plaintiffs claim the balance of the total sum due on three progress-payment certificates issued by the architect in question. Both civil suits arise out of the building contract between the parties.

The defendant filed an application in each suit that all further proceedings be stayed pursuant to section 6 of the Arbitration Act 1952 consequent on the parties herein being parties to an earlier arbitration agreement.

In each of the civil suits, an Order 14 application has been filed.

It was contended that an application for a stay could be heard at the same time with an application for summary judgment under Order 14. It was also contended that with regard to Civil Suit No. 23-107-87, the plaintiffs' claim should not go for arbitration.

Held: (1) in an application for a stay of action on the ground that the matter should be referred to arbitration, not only should there be a valid arbitration agreement, the applicant should also apply for a stay before taking any step in the proceedings after appearance. The applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. In the face of such an application from a defendant, the plaintiffs will have the onus of showing that the matter ought not to be referred to arbitration and if the plaintiffs fail to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the *prima facie* duty of the court to act upon such an arbitration agreement;

(2) on the facts, the applications for stay on the one hand and applications for summary judgment on the other hand could not and should not be heard together at the same time. The applications for stay should be heard first;

(3) the applications for stay were allowed. No order was made in each of the Order 14 applications.

Cases referred to:

(1) *Drouth* v. *The Ship, "Paul Donmer"* [1934] M.L.J. 72.
(2) *Willesford* v. *Watson* (1873) 8 Ch. App. 473, 480.
(3) *Pitchers Ltd.* v. *Plaza (Queensbury) Ltd.* [1940] 1 All E.R. 151.
(4) *Dawnays Ltd.* v. *F.G. Minter Ltd. & Trollope And Colls Ltd.* [1971] 1 W.L.R. 1205.
(5) *Bandar Raya Developments Bhd.* v. *Woon Hoe Kan & Sons Sdn. Bhd.* [1972] 1 M.L.J. 75.
(6) *Modern Engineering (Bristol) Ltd.* v. *Gilbert Ash (Northern) Ltd.* [1974] A.C. 689.
(7) *Alliance (Malaya) Engineering Co. Sdn. Bhd.* v. *San Development Sdn. Bhd.* [1974] 2 M.L.J. 94.
(8) *Elf Petroleum S.E. Asia Pte. Ltd.* v. *Winelf Petroleum Sdn. Bhd.* [1986] 1 M.L.J. 177.
(9) *Piercy* v. *Young* (1880) 14 Ch. D. 200.

APPLICATION.

Hira Singh for the plaintiff.
S.N. Leow for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: In both civil suits, *viz.* Civil Suit No. 23-106-87 and No. 23-107-87 respectively, the plaintiffs are building contractors, and the defendant, a housing developer.

I have to make an observation. The documentation of the building contract is peculiar in one way; it consists of three separate documents which should form part and parcel of a building contract in view of their reference to one another. The three documents are two short agreements dated March 19, 1984 and April 4, 1986 respectively and another document called "Standard Schedule of Conditions of Contract". The first-mentioned agreement, by its clause 1, expressly refers to the second agreement for description of the work and manner of execution of such work. The second-mentioned agreement, by its clause 5, expressly binds the plaintiffs to the said schedule of conditions of contract expressly stated to form part of the agreement. The effect would be that they would form part and parcel of a building contract between the parties herein or at any rate, the three separate documents would have to be regarded as supplementary of one another, and to be read together as a whole.

In Civil Suit 23-107-87, the plaintiffs claim damages for breach of contract, while in Civil Suit No. 23-106-87, the plaintiffs claim the balance of the total sum due on three progress-payment certificates issued by the architect in question. Both civil suits, of course, arise out of the building contract between the parties hereto.

The defendant filed an application in each suit that all further proceedings be stayed pursuant to section 6 of the Arbitration Act 1952 consequent on the parties herein being parties to an earlier arbitration agreement.

Both applications came up before the court and were granted in terms of the applications. I now give my grounds of decision.

Both applications were founded on clause 17 of the said "Standard Schedule of Conditions of Contract". It reads:

"In the event of any disputes arising in which agreement cannot be arrived at, the matters shall be referred to an agreed arbitrator and decision of the arbitrator shall be final and binding."

It would be necessary to restate a few relevant basic principles of stay of action on ground of arbitration. Not only should there be a valid arbitration agreement, the applicant should apply for a stay before taking any step in the proceedings after appearance, and that applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. Please see section 6 of the Arbitration Act 1952. These few principles require elaboration later in regard to the negative requirement of not taking any other step in the proceedings after appearance.

In the face of such an application from a defendant, the plaintiff will have the onus of showing that the matter ought not to be referred to arbitration. Please see the old case of *Drouth* v. *The Ship, "Paul Donmer"*[1], and if the plaintiff fails to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the *prima facie* duty of the court to act upon such an arbitration agreement: per Lord Selbourne L.C. in *Willesford* v. *Watson.*[2]

First of all, learned counsel took a preliminary point as to whether an application for a stay could be heard together at the same time with an application for summary judgment under Order 14, and he had requested the learned Registrar (before whom an Order 14 application for summary judgment in each of the two civil suits was to be heard) to have both Order 14 applications adjourned to the same date for hearing before me together with the defendant's two applications for stay of action pending arbitration. He submitted that they could be heard together and would like to have them so heard together.

Now, for the defendant to oppose such Order 14 applications by showing cause would obviously not be anything but taking a step in the proceedings inimical to its applications for stay, unless, according to the *ratio decidendi* in *Pitchers Ltd.* v. *Plaza (Queensbury) Ltd.*[3], a defendant, when showing cause, not only raises the point of arbitration agreement in his affidavit, but also at the same time, takes out a summons for stay on the ground of arbitration.

It was not in dispute that no affidavit was ever filed raising the point of arbitration in this showing cause. The defendant had, instead, applied for the adjournment of both Order 14 applications of the plaintiffs on the ground of its pending applications for stay and the learned Registrar had agreed to such adjournment, without the defendant even having begun to show cause or file any affidavit in opposition.

On the facts therefore, applications for stay on the one hand and applications for summary judg-

ment on the other hand could not and should not be heard together at the same time. They could of course be fixed for hearing one after another on the same day. Obviously, the order would be for the applications for stay to be heard first, and this I did. I now give my reasons with regard to the applications for stay which the court allowed.

After the preliminary point, resistance to applications for stay was offered only in regard to Civil Suit No. 23-107-87. It was submitted by learned counsel for the plaintiffs to the effect that in Civil Suit No. 23-107-87, the plaintiffs' claim was in respect of a balance of three progress-payment certificates or interim certificates and therefore, this claim should not go for arbitration for reasons which I may summarize as follows.

First, they were final and conclusive on the authority of *Dawnays Ltd.* v. *F.G. Minter Ltd. And Trollope And Colls Ltd.*[4], which was adopted by the Federal Court in *Bandar Raya Developments Bhd.* v. *Woon Hoe Kan & Sons Sdn. Bhd.*[5]

In the first-mentioned case, Lord Denning M.R. held to the effect that the purpose of these interim certificates was to provide cash for the contractor or sub-contractor to get on with the work and to subject this payment with a right of set-off and counterclaim from the defendant at this stage would be to defeat the said purpose.

The court must say, in dealing with this, that subsequent to the *Dawnays* case, another case went up to the House of Lords, *i.e. Modern Engineering (Bristol) Ltd.* v. *Gilbert Ash (Northern) Ltd.*[6] It was held there that there was no such principle (as stated above) as appeared to be laid down in the *Dawnays* case unless parties themselves in any given case had ousted such right of set-off or counterclaim and the defendants were entitled there to deduct the sum of an unliquidated claim for the purpose of a set-off from a sum due on an interim certificate. Thus one of the finest and most sensible examples of the on-going but comparatively restricted evolution of the common law was struck down. Our Federal Court subsequently approved the decision of *Gilbert-Ash,* in the case of *Alliance (Malaya) Engineering Co. Sdn. Bhd.* v. *San Development Sdn. Bhd.*[7] in which the learned trial judge's reliance on the decision in *Gilbert-Ash* was upheld. It cannot be said that the contention about interim certificates not being subject to set-off or cross-claim for alleged defective work was so clearly right that there was nothing to go to arbitration for.

Secondly, it was submitted that the progress-payment certificates had never been attacked by affidavit from the defendant or otherwise and therefore there was no dispute to go for arbitration.

In my view, short of an admission of liability, a dispute had already arisen in this case. The plaintiffs claimed payment for work done, but the defendant refused to pay, counterclaiming damages for defective work. Further, in answer to another contention of counsel, in my view, whether a qualified surveyor was qualified or not to prepare a list of items relating to such alleged defective work would remain to be seen on evidence, as to whether he had got the list done properly or not. The case of *Elf Petroleum S.E. Asia Pte. Ltd.* v. *Winelf Petroleum Sdn. Bhd.*[8] relied on by counsel for the plaintiffs would tend to go the other way for there was there an admission of liability in the correspondence between the parties there. Further, apart from entering an appearance, and appearing before the learned Registrar to apply for adjournment of Order 14 applications for summary judgment, the defendant had filed applications for stay of action pending reference to arbitration. The defendant had obviously no opportunity to file any affidavit at all in the Order 14 applications disputing the progress-payment certificates.

Thirdly, it was submitted for the plaintiffs that by appearing before the learned Registrar in Order 14 applications for summary judgment, the defendant had taken a step in the proceedings.

In my judgment, this submission had no merit at all. The appearance before the learned Registrar was merely to ask for adjournment on the ground of pending applications for stay of action.

It was fourthly submitted that a bald assertion about willingness to do everything necessary for the proper conduct of the arbitration was not sufficient.

Jessel M.R., in *Piercy* v. *Young,*[9] made an observation, though *obiter,* that the lower court should have required an affidavit to be produced on willingness and readiness to refer to arbitration. In my view, an affidavit ought to be ordinarily sufficient as to such willingness or readiness in the absence of some evidence of unwillingness on the part of the defendant to refer to such tribunal of its choice.

For the reasons given, I ruled that the applications for stay and applications for summary judg-

ment in both civil suits should not be heard together but the applications for stay should be heard first. I then allowed the applications for stay pending reference to arbitration. I then made no order in each of the Order 14 applications for summary judgment of the two civil suits herein and ordered further that costs of the applications that day be reserved to the arbitrator to be appointed.

Order accordingly.

Solicitors: *Asbir, Hira Singh & Co.; Yeoh Kian Teik & Co.*

BANK BUMIPUTRA MALAYSIA BHD. v. DORIC DEVELOPMENT SDN. BHD. & 2 ORS.

[A.C.J. (Peh Swee Chin J.) June 16, 1987]

[Ipoh – Civil Suit No. 23-204-1986]

Banking – Money lent – Secured by charge under National Land Code – Whether charge same as mortgage under English common law – Differences.

Land Law – Charge under National Land Code – Security for money lent – Whether charge same as mortgage under English common law – Differences.

The plaintiff had earlier sued the first defendant for a certain sum due on a banking account in respect of which the plaintiff had granted an overdraft facility. The money which was lent to the first defendant was secured by a charge over certain lands of the company. In addition, the third defendant guaranteed the due payment of the money.

The learned Registrar granted leave to enter final judgment against them in favour of the plaintiff. The first and third defendants appealed against the learned Registrar's decision.

Held, dismissing both appeals: (1) the premise that a charge under the National Land Code is the same as an English mortgage at common law is patently erroneous;

(2) the rules of mortgage at common law would not apply at all to a charge under the National Land Code.

Cases referred to:

(1) *Khaw Joo Tok & Ors.* v. *Ng Boo Bee & Ors.* (1920) 5 15 S.S.L.R. 183.

(2) *Bank Bumiputra Malaysia Berhad* v. *Esah bt Abdul Ghani* [1986] 1 M.L.J. 16.

APPEAL FROM REGISTRAR'S DECISION.

Ting Hui (Miss) for the plaintiff.
Tony Dhana for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: I have earlier dismissed the appeals of the first defendant (the company) and the third defendant (the guarantor) respectively from a decision of the learned Registrar granting leave to enter final judgment against them in favour of the plaintiff (the bank) on an Order 14 application for summary judgment. I now give my reasons.

The bank has earlier sued the company for $6,460,603.74 with interest and costs due on a banking account in respect of which the bank had granted an overdraft facility. Although this action is not a foreclosure summons, it will be pertinent to point out that the money so lent and so owing was also secured by a charge over certain lands of the company, in addition to its being secured also by a letter of guarantee signed by the guarantor in favour of the bank and concerned herein. In this action, therefore the bank has sued the company on a covenant to pay money so lent and so owing, and the guarantor on her guarantee to pay the same.

Before me on appeal, learned counsel for the company submitted implicitly on the basis that the said charge executed by the company was an English mortgage at common law or a transaction exactly like such an English mortgage. On the said basis, he submitted that the equity of redemption had been lost because of the order of sale by public auction made by the court. He relied on the case of *Khaw Joo Tok & Ors.* v. *Ng Boo Bee & Ors.*[1] as authority for the proposition that because of the loss of such equity of redemption, the bank could not sue the company on a covenant to pay the residue.

In the *Ng Boo Bee* case,[1] certain property was mortgaged, certainly not in the form of a memorandum of charge as under our present National Land Code or its predecessor, the former Land Code of 1926 of the Federated Malay States. The mortgage took the form of, and was intended to be, a mortgage as in England at common law. It was held to the effect as follows, after the consideration of various English authorities on such mortgage, *i.e.* that if a mortgagee first proceeded in court on the covenant to pay against the mortgagor, and obtained part but not complete payment of his debt, he could still foreclose the mortgaged property for the residue or any deficiency; but on the other hand, if the mortgagee foreclosed the property first and then found the proceeds insufficient to pay himself completely, then equity would only permit him to sue the mortgagor on